LIBRARY
SUPREME COURT, U. S.

FILED
SEP 12 1969
JOHN F. DAVIS, CLERK

No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHARLES HOFFMAN, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. BELLOWS
Ten South LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
on the brief

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	4
Statement	4
Pre-trial Motions	5
Evidence in Support of Indictment Allegations	6
Irrelevant and Prejudicial Evidence	9
Prejudicial News Publicity	18
Sentencing	20
Reasons for Granting the Writ	21
1. The admission of a large volume of evidence unrelated to the specific offense charged in the indictment	21
2. Prejudicial publicity appearing in all four major Chicago newspapers during the course of the trial required that the trial judge examine each juror individually as to possible exposure to such publicity	25
3. Imposition of consecutive sentences deprived Petitioner of due process of law and denied him his constitutional protection against double jeopardy and cruel and unusual punishment	29
Conclusion	31

PAGE

CITATIONS

Cases

Ahrens v. United States, 5th Cir. 1959, 265 F.2d 514.... 24

Bartkus v. Illinois, 359 U.S. 121, 150, 164 (dissenting Opinions) (1959) 30

Blockburger v. United States, 284 U.S. 299 (1932)..3, 20, 29

Ciucci v. Illinois, 356 U.S. 571, 573 (dissenting Opinion) (1958) 30

DeVore v. United States, 9th Cir. 1966, 368 F.2d 396.. 23

Ex Parte Bain, 121 U.S. 1 (1887) 21

Frank v. United States, D.C.Cir. 1958, 262 F.2d 695.... 23

Gore v. United States, 357 U.S. 386 (1958) 3, 29, 30

Hall v. United States, 10th Cir. 1968, 396 F.2d 428.... 27

Hoag v. New Jersey, 356 U.S. 464, 477 (dissenting Opinion) 30

Mares v. United States, 10th Cir. 1967, 383 F.2d 805..27, 28

Margoles v. United States, 7th Cir. 1969, 407 F.2d 727 .....26, 28

Maynes v. People, ... Colo. ....., 454 P.2d 797 (1969).. 29

McHale v. United States, D.C.Cir. 1968, 398 F.2d 757.. 22

Nees v. Culbertson, 5th Cir. 1969, 406 F.2d 621 22

People v. Duskewycz, 27 Ill.2d 257, 189 N.E.2d 299 (1963) 29-30

Schaffer v. United States, 362 U.S. 511 (1960) 24

Silverthorne v. United States, 9th Cir. 1968, 400 F.2d 627 .....27, 28

Smith v. United States, 8th Cir. 1956, 256 F.2d 260.... 28

PAGE

Stirone v. United States, 361 U.S. 212 (1960) 21

United States v. Accardo, 7th Cir. 1962, 298 F.2d 133 ..... 22, 27, 28, 29

United States v. Cobb, 7th Cir. 1968, 397 F.2d 416.... 22

United States v. Ewell, 383 U.S. 116, 125, 126 (dissenting and concurring Opinions) (1966) 30

United States v. Hoffa, 7th Cir. 1966, 367 F.2d 698, 730-32 (dissenting Opinion) 22

United States v. Houlihan, 2nd Cir. 1964, 332 F.2d 8.... 22

United States v. Largo, 7th Cir. 1965, 346 F.2d 253.. 27, 28

United States v. Palermo, 7th Cir. 1969, 410 F.2d 468.. 28

United States v. Phillips, 7th Cir. 1967, 375 F.2d 75, 81 (dissenting Opinion) 23

Constitutional Provisions

Fifth and Eighth Amendments to the Constitution of the United States 29

Miscellaneous

Comment, Twice in Jeopardy, 75 Yale L. J. 262 (1965).. 30

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (March, 1969), Proposed Rule 4-03(a) 23

Orfield, Relevancy in Criminal Evidence, 43 Neb. L. R. 485 (1964) 22

Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Approved Draft (1968) §3.5(f), and Commentary to Tentative Draft (1966).. 28

In the Supreme Court of the United States

OCTOBER TERM, 1969

NO.

CHARLES HOFFMAN, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Charles Hoffman, Jr., prays that a writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on July 18, 1969.

OPINION BELOW

The Opinion of the Court of Appeals is as yet unreported, but is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on July 18, 1969. A timely petition for rehearing was denied on August 13, 1969 (Appendix C. *infra*). This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where an indictment charges a general scheme to defraud policy holders of an insurance company and then particularizes that charge by alleging a specific scheme to defraud in respect to one transaction involving the sale of control of the insurance company, and defense motions to discover other particulars of the claimed general scheme are denied, may the prosecution, under the guise of proving intent, motive and design, introduce at trial a large mass of evidence of unrelated acts and transactions by the defendant and others, occurring both before and after the alleged specific fraudulent transaction, and showing questionable business practices in the conduct of the affairs of the insurance company, friction with the state regulatory agency and alleged misappropriations of funds so that the total dollar amount of the alleged fraud is increased over four times that charged in the indictment?

A. Must the trial judge, in deciding whether to admit evidence of acts and transactions not charged in the indictment for the purpose of showing intent, motive and design, weigh the potential prejudice of such evidence against its possible relevance?

B. Where such evidence is admitted to prove intent, motive and design, and its volume exceeds that of the

evidence introduced to prove the indictment transaction, should the trial judge specifically identify such evidence in instructing the jury as to the purpose for which it was received?

C. Where evidence of non-indictment offenses involving misappropriations from the insurance company is introduced during the course of an extended trial only against a co-defendant, who is subsequently acquitted by direction of the court, should the trial judge specifically identify such items of evidence in instructing the jury to disregard it?

2. If it is determined that news material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, should the trial judge examine the jurors individually and outside the presence of each other as to their exposure to that material, or may he collectively ask for a show of hands as to who has seen or read the material?

3. Do the due process, double jeopardy and cruel and unusual punishment clauses of the Constitution prohibit the imposition of consecutive sentences for multiple offenses arising out of the same act or transaction, because of the opportunity or possibility of arbitrary administration by either the prosecution or judiciary, and, in this respect, should *Blockburger* v. *United States,* 284 U.S. 299 (1932) and *Gore* v. *United States,* 357 U.S. 386 (1958), be overruled?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty or property without due process of law; * * *"

The Eighth Amendment, Constitution of United States, provides in pertinent part:

> "* * * Nor [shall] cruel and unusual punishments [be] inflicted."

STATEMENT

Petitioner was jointly indicted with Rufus R. McLarty by the United States Grand Jury. The four-count indictment charged both defendants with substantive violations of the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343) and a conspiracy to violate those statutes (18 U.S.C. § 371). Petitioner alone was charged with the further offense of transporting funds obtained by the alleged fraud in interstate commerce (18 U.S.C. § 2314). (A. 2-9)[1]

At the close of all the evidence, McLarty's motion for a judgment of acquittal was granted as to all counts. Petitioner's motion was granted as to Count Three and his case submitted to the jury on the remaining counts. A verdict of guilty was returned thereon, and Petitioner was sentenced to a period of ten years confinement in the custody of the Attorney General, followed by a term of five years probation (see, *infra*, p. 20).

The nub of the charges was Petitioner's conduct in selling to McLarty two corporations (RCD Man-

[1] "A....." references are to the Appendix of Record filed in the Court of Appeals.

agement, Inc. and RCD Agency, Inc.) concerned with the management of the affairs of Multi-State Inter-Insurance Exchange, and in receiving, as proceeds of the sale, $333,000 which were allegedly obtained from Multi-State by fraud. Count One charged that Petitioner devised a scheme to defraud "the policy holders and claimants against policy holders of Multi-State by means of false and fraudulent pretenses, representations and promises, * * *" (Count I, par. 5; A. 3) The indictment described the scheme as involving a false pretense that Multi-State owed RCD Agency and RCD Management $400,000 (Count 1, Par. 6; A. 3) in order to enable McLarty to use $333,000 of this amount in consummating the purchase of the Agency and Management from Petitioner. (Count I, pars. 7, 8, 9; A. 3-4) No other facet of the alleged scheme was described by the indictment.[2]

Pre-trial Motions

Prior to trial, Petitioner moved for a bill of particulars, requesting to be advised what the Government would contend were the false pretenses and the false and fraudulent representations by which he schemed to defraud Multi-State's policy holders and claimants, as claimed in the general allegations of paragraph five of Count One. (R. 24-5)[3] The Government resisted this motion (R. 129-30),

[2] Count Two incorporated by reference all of the "descriptive" paragraphs of Count One. (A. 5) The conspiracy count (Three) reiterated, almost verbatim, the "descriptive" passages of the substantive counts. (Count III, pars. 6, 7, 8, 9, 10, 11; A. 7-9) The one overt act charged that Petitioner deposited the proceeds of the sale in a Chicago bank. (A. 9) The transportation count (Four) alleged that Petitioner transported these proceeds from Georgia (where the sale was consummated) to Chicago knowing them to have been obtained by fraud. (A. 9)

[3] "R....." references are to the record as filed in the Court of Appeals.

and it was denied. (R. 10) Again prior to trial, Petitioner sought to examine documents bearing on transactions involving Multi-State which occurred after the sale to McLarty, because, as he expressed to the district judge, of a concern "that during the course of this trial the Government may introduce proof of events which took place after February 4, 1964, the date alleged in the indictment on which the transactions—" described in the indictment occurred. (A. 1017) This request for discovery was also denied. (A. 1019)

Evidence in Support of Indictment Allegations

In support of its claim that Petitioner received funds from Multi-State as consideration for the sale of RCD Management and Agency to McLarty, the Government introduced evidence showing that in the summer of 1963 the Illinois Insurance Department began a routine examination of Multi-State for the period October 1, 1960, to December 31, 1962. The examination disclosed that Multi-State's books did not reflect a liability to RCD Management for approximately $200,000 in fees owed under a power of attorney agreement,[4] and that, if the fee were recorded, Multi-State's surplus would be impaired to the extent that it would be required to cease selling insur-

[4] Under Illinois law, all the business of a reciprocal insurance company is conducted by an attorney-in-fact. (Ill.Rev.Stat., 1967, Ch. 73 §§ 673, 697) RCD Management acted as attorney-in-fact for Multi-State under a written power of attorney (G.Ex. 4, A. 1037-40) approved by the Illinois Director of Insurance in 1961. That power provided that RCD Management was to receive twelve per cent of the gross annual premium deposit income of Multi-State as a management fee. Prior to February 4, 1964, RCD Management assigned all monies owing from Multi-State under the power of attorney to RCD Agency. (G.Ex. 29, A. 1055-56)

ance. In July, 1963, Drobny, the counsel for the Department, told Petitioner, who was the chief executive officer of Multi-State, that unless RCD Management executed a written waiver of the fee for the period under examination Multi-State would not receive a favorable examination report. Thereafter, Petitioner delivered such a waiver (G. Ex. 5) to Drobny. (A. 124-34, 165-6). No waiver was requested or given for 1963.

Multi-State's problems with the Department continued. In November, 1963, the Director of Insurance brought an action in the Circuit Court of Cook County to liquidate Multi-State pursuant to statute. The action was prompted by a number of alleged violations of the Illinois Insurance Code by Multi-State, but no claim was made that the reciprocal was insolvent. (A. 878; G. Ex. 7; D. Ex. 3) Indeed, Multi-State's June 30, 1963, financial statement, filed with the Department in August, 1963, showed assets of $2,461,725 and a surplus of $250,000. (G. Ex. 2; A. 1032-3) On December 18, 1963, the parties agreed to an order dismissing the action. As a result, the Circuit Court found that Multi-State had voluntarily ceased writing new insurance, and had commenced cancelling existing policies. In addition, Multi-State was required to notify the Director of Insurance and to file a statement of condition and submit to an examination thereon before resuming business. (G. Ex. 9; D. Ex. 3; A. 1045-6, 1083)

During January, 1964, Petitioner and an associate, Albert Druker, negotiated for the sale of RCD Management and RCD Agency (which were wholly owned by Petitioner) to McLarty. (A. 499-500) Petitioner explained that after the entry of the December, 1963, order by the Circuit Court of Cook County he decided to sell RCD Management and Agency. Petitioner's attorney told him that it would be

to his tax advantage to sell Management and Agency and thus receive a long term capital gain, rather than to cause payment of the fee to Agency and then make distribution to himself as a dividend. He had also been advised by his attorney that the waiver of attorney-in-fact fees for 1961 and 1962 was not binding because it had been executed and delivered upon the unfulfilled condition that Multi-State would thereafter receive a favorable examination report from the Department for the years in question. (A. 782-4) This testimony was corroborated by the attorney. (A. 866-9)

As a consequence, Petitioner, McLarty and Druker met several times in Georgia to discuss the proposed sale. (A. 500) Petitioner advised McLarty that, after all offsets, Multi-State owed the RCD companies over $400,000 and that Multi-State had sufficient funds to pay the debt. (A. 229, 493, 784-6, 796) He showed McLarty and McLarty's attorney, Byrd, a paper containing computations to that effect. (A. 229) Petitioner and McLarty executed a contract for the sale of all of the stock of RCD Management and Agency for $333,333. The order entered by the Circuit Court of Cook County on December 18, 1963, was attached to the contract. Petitioner also delivered other documents, including an assignment of a contract between himself and RCD Management by which Management agreed to pay him the fee which it was to receive from Multi-State under the attorney in-fact agreement. Petitioner also delivered an affidavit that he had not waived any rights under the assigned contract. (G. Ex. 45-46; A. 1065-73) The closing was held on February 4, 1964, in Reynolds, Georgia, in order to accommodate Byrd, who was recuperating from a heart attack. (A. 256-7)

McLarty secured the $333,000 with which to make the payment to Petitioner in the following manner: Prior to February 4, 1964, Petitioner, at McLarty's request, had transferred approximately $585,000 of Multi-State's funds from various Chicago banks to a bank in Kingsland, Georgia. These funds were returned to Chicago by the bank on January 31, 1964. (A. 211-20, 1062-4) When Petitioner received these funds he went to the First National Bank of Chicago and conferred with an employee about getting the money to Reynolds, Georgia, again at McLarty's request. The Chicago bank then credited the account of Multi-State at the Reynolds bank through its corresponding bank in Raleigh, North Carolina. (A. 325-39) On February 4th, McLarty opened accounts at the Reynolds bank for Multi-State, RCD Agency and himself. He drew a $335,000 check to Agency from the Multi-State account and deposited it in the Agency account; he then paid himself $334,000 from Agency and deposited it in his personal account; finally, he drew a $333,000 check on his account and with it paid Petitioner. Petitioner endorsed the check for deposit to his account at the Lake Shore National Bank in Chicago and arranged for the funds to be transferred by wire from the Reynolds bank to his own. (A. 274-7, 295-306)

Irrelevant and Prejudicial Evidence

Over Petitioner's objections at every juncture—during opening statement, while the evidence was being introduced, after it was admitted, during closing arguments and in post-trial motions—the trial court permitted the government to introduce evidence of a plethora of transactions involving not only Petitioner's conduct of the affairs of Multi-State and RCD Agency and Management in matters

not related to the indictment offense, but involving the conduct of the affairs of these business entities after the February 4th sale as well. This proof also included activities of the co-defendant McLarty resulting in the misappropriation of $279,000 for his own benefit. In the end, although the indictment charged a misappropriation of $333,000, Petitioner was accused of taking four times that amount and the jury heard him described as having engaged in a "wholesale looting" of Multi-State in the amount of a "million and a half dollars." (A. 979)

Evidence of Friction with Department of Insurance

A former attorney for the Illinois Department of Insurance, Fred Levin, was permitted to testify to a conversation with Petitioner in November, 1961, in which Levin recommended that Multi-State adopt a more liberal attitude regarding the settlement and disposition of claims. Levin said that Petitioner replied, "if the State continued to push him on these things, he would write an excessive amount of premium and leave the State with an empty shell of a company." (A. 691-6, 702-3, 710) The Court of Appeals, in response to Petitioner's claim that this evidence was prejudicially irrelevant and immaterial, mistakenly believed that this conversation occurred during a meeting concerning "the financial impairment" of Multi-State, and held that it expressed Petitioner's "intent and motive." (App. A., *infra*, p. 10) Repeated references based on this same erroneous premise were made to this evidence in the prosecutor's closing arguments. (A. 951, 953, 995-6)

Ostensibly to show that Petitioner knew of Multi-State's insolvency on February 4th, the Government has said (G. Br., pp. 59-60),[5] it was necessary to introduce evidence that

[5] "G.Br. ....." references are to the Brief filed by the Government in the Court of Appeals.

in September, 1963, Drobny had challenged certain bonds of the Griffin Finance Company held by Multi-State as an admissible asset, and contended that Multi-State's surplus was impaired thereby. In addition, however, the Government was also permitted to prove other circumstances strongly suggesting that the bonds were spurious and that Griffin Finance did not exist. (A. 136-40) Furthermore, the Government was also allowed to show that in February or March, 1964, Druker received a $35,000 check drawn to the order of Griffin Finance Company from RCD Management as a finder's fee for his work in assisting McLarty to purchase the two RCD companies. (A. 491) Petitioner had not been told about that payment to Druker. (A. 499)

In another vein, the Government was allowed to show, through the testimony of a former employee, that Petitioner directed efforts by Multi-State to avoid paying claims against its policy holders, and had left instructions to advise the Insurance Department, should it inquire about a particular claim, that the company was taking "pains to take care of that claim." (A. 538-9)

Evidence of other alleged misappropriations

The Government was permitted to prove that in September, 1963, Multi-State paid a total of $83,000 to RCD Agency and Progressive General Agency[6] for certain improvements which they had paid $43,000 in July to have made to a building owned by Petitioner. At the same time Multi-State entered into a twenty-year lease with Petitioner. (A. 464-7, 523-4, 641-2) At the end of November, 1963, Multi-State assigned its leasehold interest to Progressive General Insurance Company.[7] In consideration

[6] An Illinois Corporation owned by Petitioner.

[7] An Illinois stock insurance company controlled and owned by Petitioner's Insurors Holding Corp.

of Progressive General's acceptance of the lease and, perforce, the primary obligation for the long term rent, Multi-State abandoned the improvements to Progressive General. It did, however, continue to occupy a portion of the building as a sub-tenant of Progressive General. (A. 525-8, 642-3) From that time until January 24, 1964, Multi-State made additional payments of $32,604 for leasehold improvements to its space in the building. (A. 641, 644-5) After the February 4th sale, McLarty moved Multi-State, RCD Agency and RCD Management from the building. (A. 524-5) A chart introduced by the Government accused Petitioner of diverting $116,154 from Multi-State in this transaction. (G. Ex. 75; A. 742, 1082) The prosecutor referred to this evidence and similar evidence at length in his closing argument to support his theme that Petitioner was a "crook" and a "manipulator"[8] who "looted" Multi-State of more than a million dollars, thus driving Multi-State into insolvency to the detriment of its policy holders, who were potentially subject to assessment to make up for Multi-State's deficits or to claims upon their estates to satisfy judgments which Multi-State could not defend, and to the detriment of persons injured by these policyholders who could not look to an insurance company to compensate them fully for their injuries. (See, e.g., A. 954-7, 992, 996)

The Government was allowed to show that RCD Management transferred title to a law library and two cars to another corporation owned by Petitioner in exchange for services performed by that corporation. (A. 543-4) Subsequent to the transfer, Multi-State made three payments totalling $666.71 on existing chattel mort-

[8] The Court of Appeals agreed with Petitioner that government counsel appealed to sympathy and prejudice by referring to Petitioner in such and more opprobrious terms, but found the error "harmless." (App. A, *infra*, p. 15)

gages on the cars. (A. 660-2) There was no evidence to show that Petitioner was aware of these payments. Again, the Government's chart (G.Ex. 75, A. 1082) accused Petitioner of diverting the value of the law library and the payments from Multi-State. And the prosecutor made several references to this evidence as showing other misappropriations of Multi-State's funds. (A. 953-4, 963, 982)

Moreover, the Government was also allowed to show individual payments of money to Petitioner which were unconnected with the charged scheme. These payments—a $6,000 salary payment from Multi-State on December 31, 1963, and a $20,000 salary payment from RCD Agency (after Agency had received an advance on commissions from Multi-State) on January 2, 1964,—were included in the chart (G.Ex. 75, A. 1082) and formed a basis for the prosecutor's closing argument on how Petitioner had engaged in "massive looting" of Multi-State. (A. 957-9, 982)

Continuing along the same lines, the Government was permitted to show that another $139,750 was obtained from Multi-State in the following manner. On December 30 and 31, 1963, RCD Agency loaned $89,500 to Progressive General Agency from the Multi-State premium trust account. (A. 645-9) At the same time an entry was made on RCD Agency's books showing commissions of approximately $87,000 due Progressive General by reason of a 4% fee contract executed between the parties and dated January 2, 1963. This amount was offset against the $89,500 leaving RCD Agency owed a balance of $2,500. (A. 649-54) In September, 1963, RCD had loaned Petitioner $50,000 ($40,000 of which had come from the sale of the leasehold improvements—see pp. 11-12, *supra*) in exchange for his note secured by a junior mortgage. On February 13, 1964,—following the sale to McLarty—RCD Agency as-

signed the mortgage to Progressive General Agency in consideration of the cancellation of the 4% contract and as a credit against amounts due under that contract, although nothing was owing on that date because Multi-State did not write any insurance during the month of January, 1964. (A. 655-9; G. Ex. 36, A. 1057-8) The Government's chart included these transactions under a separate section showing an alleged transfer to Progressive General of $139,750 of Multi-State property. (G.Ex. 75, A. 1082.) Again, the prosecutor relied on these transactions as evincing the manner in which Petitioner "dipped into Multi-State's monies." (A. 958-9, 964)

The Government also introduced evidence which it claimed (A. 965-6, 982) showed that Multi-State had sustained a $200,000 loss in a complicated securities transaction which occurred substantially after February 4, 1964. The evidence, which ostensibly was introduced to show design and Petitioner's intent on February 4th, centered about Multi-State's July 1964, sale of 326.225 shares of preferred stock in Insurors Holding Corp. (a "closely held" holding corporation) to Petitioner's So-Jess Management, Inc., for $500 a share, or $163,000. Multi-State had started to acquire this stock in August, 1962, at an eventual total cost of $362,625. (A. 473-86) On February 4th, Multi-State acquired its last block of this stock by exchanging shares of Progressive General Insurance Company. (A. 479) To establish the alleged loss, the government showed that in May of 1964, Progressive General Agency purchased identical stock from individuals at the cost of $1200 a share and that on July 15, 1964, Progressive General Agency paid $1,000 a share for the stock. (A. 488-9) No effort was made, however, to value the securities or to gauge the fairness of the transac-

tion in question. The stock had no determinable value. (A. 484-7) The transactions were the subject of a separate Government chart (G. Ex. 73, A. 1080), which concluded that Multi-State had lost $200,000 in the sale of its securities. The prosecutor referred to this transaction as evincing Petitioner's desire to obtain more of Multi-State's assets. (A. 965, 966, 982)

Misappropriations by McLarty

A substantial amount of proof concerning misappropriations by McLarty after February 4, 1964, was admitted throughout the long trial over the objections of both defendants that these acts had no bearing on the defendants' motives or intents on February 4th and that the central object of the scheme and conspiracy was accomplished, if at all, on February 4th. (A. 278-94) The proof, showing several disbursements by McLarty for his own personal benefit of funds over a seven-month period totalling approximately $279,000, was graphically illustrated on Government's Exhibit 74 (A. 1081) and was explained in detail by the government's summation witness, Postal Inspector Head. (A. 733-9; see also A. 295-303, 307-15, 316-21) Although the evidence was admitted only as to McLarty (A. 295, 309, 317), it was depicted on the chart in conjunction with Petitioner's receipt of the $333,333 allegedly obtained by the scheme to defraud. After McLarty was acquitted at the conclusion of all of the proof, Petitioner unsuccessfully moved for a mistrial because of the prejudice created by the evidence. (A. 11, 16-17, 928-9) Petitioner then moved that the jury be instructed to disregard all evidence relating to events which occurred after February 5th, or which was introduced solely as to McLarty, and to disregard the prosecutor's opening statement with respect to those matters. (A. 17-22) He also moved that the jury be advised as to the

names of the witnesses whose testimony should be ignored. (A. 931-3) These motions were denied. (A. 23, 929-34) The trial judge gave a general instruction that the jury should disregard evidence "admitted solely against the defendant Rufus McLarty" and the prosecutor's opening statement regarding that evidence.

Petitioners alleged mismanagement of Multi-State

In early 1963, prior to the aforedescribed examination of Multi-State (see p. 6, *supra*), Petitioner asked George Bloss, the nominal president of RCD Management, to sign Multi-State's 1962 annual statement. (G. Ex. 2). Bloss said he thought the "claim reserve" figures were incorrect. Petitioner insisted the figures were correct and said "that's the way it was going to be submitted." Bloss claimed he asked Petitioner, "Does this mean that I will go to jail?" and he replied, "Don't you worry about it. I will take care of everything." (A. 556-8) Although it later claimed that this testimony was introduced to show that Petitioner actually conducted the affairs of RCD Management and Multi-State (G. Br., p. 61), the Government used this testimony at trial to bolster a general attack on the truthfulness of all Multi-State reports prepared under Petitioner's direction. (A. 972-3)

Despite an initial awareness that evidence RCD Agency did not have the requisite Illinois license to sell insurance from and after March 1, 1963, did "not tend to prove the charge in the indictment" (A. 157-8; R. 347-68), the trial judge eventually permitted introduction of such evidence. (A. 548)

Finally, the Government was allowed to show that on September 11, 1964, Multi-State was placed into liquidation by the Circuit Court of Cook County and that, at the

time, there were approximately 3,000 unpaid claims against Multi-State policy holders and Multi-State then had about $3,000 in its bank accounts. (A. 119-22, 154-7, G. Ex. 11, A. 1046) The prosecutor referred extensively to Multi-State's liquidation and the resulting effect of that liquidation upon policy holders and claimants against policy holders in his summation. (A. 991-2).

In response to Petitioner's claims that the trial court improperly admitted the foregoing evidence because it was irrelevant and immaterial, and also because its net prejudicial effect far outweighed any possible relevance, the Court of Appeals, per Judge Kerner[9] held:

> In November, 1963, the Illinois Director of Insurance attempted to enjoin Multi-State from transacting any further business. Simultaneously, Hoffman set in motion the series of transactions that finally depleted the assets of Multi-State, as well as the intricate direction of multitudinous inter-organizational assumptions of financial obligations and asset transfers all of which were "so blended or connected with the one on trial as that proof of one incidentally involves the other." *Bracey* v. *United States, supra.* Hoffman continued to execute his threat to leave an "empty shell" through his actions and directions after the "sale" in February, 1964, by obtaining the signatures of the "purchasers" on documents authorizing transfers after the sale date.

[9] Judge Kerner, the Governor of Illinois during the times in question, had appointed the Illinois Director of Insurance. The trial court recognized that the Director had initiated a campaign to deal with "these insurance things" in Illinois. (A. 1012)

We hold that the trial court properly allowed the introduction of other transactions to prove motive and design to establish a common scheme relating to the matter on trial.

(App. A, *infra*, pp. 10-11)

Prejudicial News Publicity

The trial court consistently directed the jury, at the close of almost every day, not to read any newspaper stories concerning the case. (E.g., A. 118, 665, 854) Petitioner testified in his own behalf on Thursday, May 4, 1967. (A. 754-848) On Friday, May 5, 1967, the Chicago Tribune published a story concerning Petitioner's testimony, but added that "The government contends Hoffman fraudulently converted $817,000 to his own use." The story also stated that Multi-State had been "taken over in September, 1964, by the state department of insurance for insolvency and non-payment of claims." Under a separate sub-heading, "Policy Holders Lose," the article added the following, which was not in record: "The insurance company's 20,000 policy holders lost their premiums and were left without any insurance when the state took over Multi-State." (A. 1020)

On the next trial day, Petitioner moved that each juror be examined, outside the presence of the other jurors, "with respect to whether he or she has read the stories * * *, and such other questions as may arise from that inquiry." (A. 1019-20) The trial judge denied the motion and instead inquired from the jury collectively whether any of them had read anything about the case over the week-end. No juror responded. (A. 12, 854-7)

On the day following the trial judge's direction of acquittal as to McLarty, all four major Chicago newspapers published stories about the case. (A. 1021-24) One story

asserted that Multi-State "failed in 1964, owing its policy holders some $800,000." (A. 1021) A second reported that "The government contends that Hoffman looted the insurance company between 1960 and 1963 while Multi-State was being managed by RCD Management Company, then owned by Hoffman." It also repeated its earlier statement that, "in 1964, the state department of insurance took over Multi-State because it was insolvent and unable to pay claims. The firm's 20,000 policy holders lost their premiums and were left without insurance." (A. 1022) The third paper reported that final arguments were about to be made "in an insurance fraud case the government contends ruined an Illinois insurance company and left 20,000 policy holders without auto coverage." That story also reported that "McLarty and Hoffman were accused of diverting $585,000 belonging to the Multi-State Insurance Company * * * * " and that the trial judge had said "the prosecution failed to make a case against McLarty." (A. 1023) The fourth story reiterated that the defendants were charged with defrauding the insurance company of $585,000 and stated that the company was "taken over by the state in 1964 for insolvency and non-payment of claims. The company's 20,000 policy holders lost their premiums and were left without insurance when the state took control." (A. 1024) Petitioner again moved for the individual, in camera, questioning of each juror. (A. 1021-4) This motion was denied and the jury was again asked as a whole whether any of them had read anything about the case. No juror responded. (A. 934-6, 948)

At the conclusion of the case, the jury was charged to dismiss any newspaper articles from their minds and to base their verdict solely on the evidence.

The Court of Appeals held that, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the trial judge is not required to conduct an examination of the jurors individually and outside of the presence of the other jurors. (App. A, *infra,* p. 12)

Sentencing

Following denial of his post-trial motions, Petitioner was sentenced on Count Four to ten years imprisonment and to pay a fine of $10,000 and costs. The trial judge placed Petitioner on probation for five years on Counts One and Two, the probation to commence upon Petitioner's release from the incarceration imposed on Count Four and to be conditioned upon Petitioner's making restitution in an amount to be ascertained by the Illinois Director of Insurance. (A. 28-29, 110-15)

The Court of Appeals held, upon the authority of *Blockburger* v. *United States,* 284 U.S. 299 (1932), that Petitioner was not entitled to complain of the consecutive sentencing "since the violations for which the defendant was found guilty are two separate offenses under 18 U.S.C. §2314 and §§1343 and 1341." (App. A, *infra,* p. 16) However, the Court did hold that "Failure of the condition of probation to meet the requirements of identity and amount requires that the cause be remanded for revision of the condition of probation to meet the requirements of 18 U.S.C. §3651, or the vacation of such condition." (App. A, *infra,* p. 19)

REASONS FOR GRANTING THE WRIT

1. The admission of a large volume of evidence unrelated to the specific offense charged in the indictment.

No one, it may be assumed, would seriously contend that a defendant in a criminal case may be tried on charges that are not made in the indictment against him. *Ex parte Bain*, 121 U.S. 1 (1887); *Stirone* v. *United States*, 361 U.S. 212 (1960). Yet, in a very practical sense, that is exactly what happened in the instant case. Granted, the means by which this was accomplished were substantially different from *Bain* and *Stirone*, where the trial courts permitted either amendment of the indictment or so charged the jury as to effect an amendment, but the result is so startlingly similar as "to call for an exercise of this Court's power of supervision."

The trial of this case commenced upon the justifiable assumption that what was involved was Petitioner's sale of RCD Management and Agency in consideration of $333,000 which was paid to him after being obtained from Multi-State upon the claim that Multi-State was indebted to RCD Agency in that amount. (Indictment, Count I, pars. 6-10; A. 3-5) So framed, the issues were whether Petitioner devised a scheme to defraud by falsely pretending that Multi-State owed $335,000 to RCD Agency, when in fact no debt existed, or whether the debt did exist, or, if not, whether Petitioner honestly believed it did.

It cannot be said that Petitioner was lax in making this assumption. His pre-trial motions — directed toward discovering whether the Government intended to broaden the

alleged scheme to defraud by the introduction of evidence of "other offenses"—were all denied. (A. 10, 1015; Tr. 23-38)

Nevertheless, by the device of purporting to show other offenses, the Government was permitted to broaden the alleged scheme to the extent that Petitioner found himself defending not only his conduct in the sale of RCD Management and Agency, but his conduct in the management of these companies and Multi-State and the conduct of others after he sold the two companies as well. (See, e.g., A. 978, 982, 988) The device employed by the Government is not uncommon in so-called "financial crime" prosecutions. Cf. *United States* v. *Hoffa,* 7th Cir. 1966, 367 F.2d 698, 730-732 (dissent); *Nees* v. *Culbertson,* 5th Cir. 1969, 406 F.2d 621; *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133. Yet the standards for testing the admissibility of such evidence are far from uniform. Compare, *McHale* v. *United States,* D.C.Cir. 1968, 398 F.2d 757, with *United States* v. *Cobb,* 7th Cir. 1968, 397 F.2d 416 (the former denying and the latter affirming that subsequent similar transactions may be introduced to show intent); compare *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133 (evidence of prior tax returns showing receipts of large amounts of money apparently from gambling not admissible to prove motive, intent or willfulness in prosecution for making false and fraudulent statements in income tax return), with *United States* v. *Houlihan,* 2nd Cir. 1964, 332 F.2d 8 (evidence regarding the financial problems of two companies involved in the indictment transactions and of manipulations of the assets of these companies by the defendants admissible to show "motive"). See generally, Orfield, Relevancy in Federal Criminal Evidence, 43 Neb.L.R. 485, 517-31, 537-42 (1964).

The decision of the Court of Appeals does little to promote uniformity in this area. By sanctioning the admission of the extraneous evidence of Petitioner's other alleged misappropriations, of his friction and conflicts with the Illinois Department of Insurance, of other aspects of his management of the affairs of Multi-State and the two RCD companies, and of the post-February 4th conduct of the affairs of these entities upon the premise that these various and varied transactions and events were "so blended or connected with the one on trial as that proof of one incidentally involves the other" (App. A, *infra*, p. 11), the decision not only broadens the scope of the prosecution but introduces two additional factors which call for the intervention of this Court's supervisory powers.

First, the effect of the decision fairly well eliminates any possibility of weighing the prejudice engendered by extraneous evidence against its possible relevance. See, e.g., *Frank* v. *United States*, D.C.Cir. 1958, 262 F.2d 695; *DeVore* v. *United States*, 9th Cir. 1966, 368 F.2d 396; *United States* v. *Phillips*, 7th Cir. 1967, 375 F.2d 75, 81 (dissenting opinion). The recently promulgated "Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates" contains the following recommendation (Proposed Rule 4-03(a)):

> "(a) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

The present case exemplifies a number of instances in which this principle would have valid application. For example, to show, purportedly, the degree of control which Petitioner exercised over the conduct of the affairs of

Multi-State, the Government introduced evidence of an incident wherein Petitioner commanded Bloss to sign Multi-State's annual statement. But the evidence also included an assertion that Petitioner had misstated the reserve for claims and that the misstatement was criminal in nature. (A. 556-8) In addition, the Government was allowed to bring out further evidence that there had been an alteration of the figures in this statement, evidence which was stricken only after it failed to prove that Petitioner had actually made those changes. (A. 554-5)

Second, the use of potentially misleading and prejudicial extraneous evidence for special purposes, such as to prove motive and design, should be accompanied by some specific explanation of the manner in which each item of evidence is to be considered so that the jury is not confused or misled. Cf. *Ahrens* v. *United States*, 5th Cir. 1959, 265 F.2d 514, 516 ("A cautious use of such testimony as to other crimes has been made quite generally over the years. The court below observed the requisite caution when it charged the jury *specifically* that the King testimony was not admitted as proof of the substantive crime charged against appellant, but only to assist the jury in arriving at his motive and intent in doing the things he did." Emphasis added.) The Court has touched on the subject in *Schaffer* v. *United States*, 362 U.S. 511 (1960), where subsequently discovered misjoinder of defendants was held not to be prejudicial because of the manner in which the trial court had " * * * meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.' " 362 U.S. at 515. Here, Petitioner had asked that the same care be exercised with respect both as to the evidence allegedly offered to prove motive and intent

and as to that offered solely against the co-defendant McLarty (A. 17-23, 29, 31-33), but only general, non-specific instructions were given.

2. Prejudicial publicity appearing in all four major Chicago newspapers during the course of the trial required that the trial judge examine each juror individually as to possible exposure to such publicity.

The publicity concerning this case which appeared in all four major Chicago newspapers during the trial is notable for two reasons. First, most of the newspaper items reported that Petitioner was being tried for or had been accused of misappropriating sums grossly in excess of those charged in the indictment. These articles thus dovetailed with the prosecution's ultimate theory of the case in which Petitioner found himself accused of the "wholesale looting" of Multi-State and of misappropriating one and one-half million dollars, even though the indictment alleged a specific misappropriation of $333,000. In one of the articles, Petitioner was directly accused of having joined with McLarty in misappropriating $585,000 and, by innuendo, in view of the reported findings of the trial judge that the prosecution "failed to make a case against McLarty," accused of having misappropriated this sum by himself. Petitioner, as we have noted, advised the trial judge of his fear that he would suffer prejudice by reason of evidence showing McLarty's misappropriation of $210,000 of this $585,000 which had been transferred to Georgia, and requested the judge to exclude this evidence specifically from the jury's consideration. The trial judge refused this request, preferring instead to instruct the jury generally. But any juror who read the prejudicial news account would clearly have been led to the erroneous conclusion which Petitioner feared.

Second, all of the newspaper items reported highly inflammatory accounts of Multi-State's fate — noting that 20,000 policy holders had been deprived of value for their premium payments and left without insurance by this fate. Although there was no evidence introduced concerning the effect of Multi-State's "failure", nor could any have been introduced, these articles also dovetailed with the prosecutor's closing argument, in which he said:

> "Could he have believed that these families that he left without any money, could he have believed that he could write them worthless insurance and cheat them and defraud them? Could he believe that that money was owing? Of course not; of course not. * * *
>
> " * * * They asked you on the voir dire whether you had been involved in accidents, because they didn't want one of those people here. But it could have been you, it could have been your next door neighbor, and he would have the money in his pocket and they would be destitute, mortgaging homes, garnishing wages because there is no money because he put it in his pocket, because he has cheated these people, and he tells you 'Good faith', multiple corporations, maneuvering back and forth all the time, nominees, hiding behind everything, and he tells you 'Good faith'. * * * " (A. 991-2)

In the face of prejudicial news reporting that lent potential substance to such prosecutorial tactics, Petitioner asked that the trial judge examine each juror, individually, whether he or she had been exposed to such publicity.

Adhering to *Margoles* v. *United States*, 7th Cir. 1969, 407 F.2d 727, 735, in which it had said that where prejudicial publicity is brought to the court's attention during trial, the trial judge must ascertain if any jurors had read or heard the publicity, and, if so, such jurors must then be examined individually and outside the presence of each

other to determine the effect of the publicity, the Court of Appeals here refused to adopt the practice announced by the Tenth Circuit of making the initial inquiry of each juror out of the presence of the others. *Mares* v. *United States,* 10th Cir. 1967, 383 F.2d 805; see also, *Hall* v. *United States,* 10th Cir. 1968, 396 F.2d 428, 429.

In *Mares,* defense counsel called a prejudicial news article appearing during trial to the attention of the trial judge and moved for a mistrial. He did not ask the court to poll the jury. The Tenth Circuit held:

> "The nature of the article was such that the trial court should have immediately ascertained whether any jurors had been exposed to it. * * * It should have been done by a careful examination of each juror out of the presence of the remaining jurors." 383 F.2d at 809.

In two decisions preceding *Margoles* the Seventh Circuit had intimated that individual examination of jurors was the approved practice. In *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133, Judge Kiley, who rendered the decision of the court, stated that the trial judge "should have, by the careful examination of each juror, out of the presence of the other, determined the effect of the articles on those who have read them and whether they discussed the articles with others." 298 F.2d at 136.

Similarly, in *United States* v. *Largo,* 7th Cir. 1965, 346 F.2d 253, 256, the court, in commenting on *Accardo,* stated that "the better practice is to interview each juror singly out of the presence of all of the other jurors." Cf. *Silverthorne* v. *United States,* 9th Cir. 1968, 400 F.2d 627, 644 ("We think that in view of the nature of some of the newspaper publicity unfavorable to the appellant, the trial court should have interrogated the jury, in camera, when requested to do so by defense counsel.").

Because one judge dissented in *Accardo*, and Judge Duffy wrote a separate concurring opinion, the Seventh Circuit subsequently explained, in *Margoles*, that it would not follow Judge Kiley's opinion. See *United States* v. *Palermo*, 7th Cir. 1969, 410 F.2d 468, 471 n. 3.

The American Bar Association Advisory Committee on Fair Trial and Free Press (the "Reardon Committee Report") has followed *Mares* and the suggestions expressed in *Accardo*, *Largo* and *Silverthorne*, and recommended:

> "If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. * * * " Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Approved Draft (1968) §3.5(f).

The Commentary specifically notes that "It is important, however, that the method of separate questioning * * * be followed here and that the court not adopt a practice such as that employed in *Smith* v. *United States* [8th Cir. 1956, 236 F.2d 260], where the trial judge asked anyone who 'violated the instructions of the court' to raise his hand." Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Tentative Draft (1966) Commentary to §3.5(f), p. 145. And, even though the Seventh Circuit has rendered *Accardo* substantially impotent on this question, the Committee recommendations expressly approve (pp. 145-6) Judge Kiley's observation in *Accardo* that jurors collectively examined in public would be hesi-

tant to reveal that they had violated a district judge's admonition not to read about the case, but that the same reluctance would be diminished by individual in camera examinations. *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133, 136.

What Petitioner herein requests is that this Court, in the exercise of its supervisory powers, examine the conflict between recent rulings of the Seventh Circuit on the one hand, and rulings of the Tenth and Ninth Circuits, and former expressions of the Seventh Circuit on the other hand. The need for such an examination and ultimate expression by this Court, we respectfully suggest, is advanced by the recommendation of the American Bar Association.

3. Imposition of consecutive sentences deprived Petitioner of due process of law and denied him his constitutional protection against double jeopardy and cruel and unusual punishment.

Despite this Court's reaffirmation of the principles announced in *Blockburger* v. *United States,* 284 U.S. 299 (1932) as recently as 1958 in *Gore* v. *United States,* 357 U.S. 386, the issue of whether a trial judge may sentence consecutively for violations of more than one statute arising out of the same transaction continues to provoke dissatisfied reaction. The reasoning of *Blockburger* and *Gore* has been rejected by a number of states. See, e.g., *Maynes* v. *People,* ..... Colo. ....., 454 P.2d 797 (1969) reversing consecutives sentences imposed for burglary and larceny arising out of the same transaction on the ground that such sentencing practices are "inherently wrong and unjust"; *People* v. *Duszkewycz,* 27 Ill.2d 257, 189 N.E.2d 299 (1963) (two punishments cannot be imposed for a single act, even

though different ingredients are involved in the two crimes.) Compare, Ill.Rev.Stat., 1967, Ch. 38, § 1-7(m), which prohibits cumulative punishment where the offenses arise out of the same conduct. One commentator has pointed out that the rationale employed by the majority in *Gore* — that the intent of Congress to permit imposition of cumulative sentences is expressed by the existence of the varying statutes — is questionable in the least. Comment, Twice in Jeopardy, 75 Yale L.J. 262, 302-4 (1965).

It is the opportunity for, or possibility of, arbitrary administration by either the judiciary or the prosecution which exposes the *Blockburger-Gore* principle to constitutional criticism. Cf. *United States* v. *Ewell,* 383 U.S. 116, 125 (concurring opinion of Mr. Justice Brennen), 126 (dissenting opinion of Mr. Justice Fortas, with whom Mr. Justice Douglas joined) (1966); *Hoag* v. *New Jersey,* 356 U.S. 464, 477 (dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black joined) (1958); *Ciucci* v. *Illinois,* 356 U.S. 571, 573 (dissenting opinion of Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Brennan joined) (1958); *Bartkus* v. *Illinois,* 359 U.S. 121, 150 (dissenting opinion of Mr. Justice Black, with whom the Chief Justice and Mr. Justice Douglas joined) 164 (dissenting opinion of Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined) (1959). Contrariwise, the statutory scheme which Mr. Justice Frankfurter proposed as the basis for the decision in *Gore* is not open to the constitutional criticism, because it is precise and offers no opportunity for arbitrary administration.

It is on this basis that we respectfully urge the Court to reconsider *Blockburger* and *Gore.* Consecutive punishments for multiple offenses arising out of the same act or

transaction may be permitted where specifically provided for by statute. But that hypothetical situation, used as the rationale for *Gore,* is not the situation which actually exists. What exists is an almost unbridled opportunity for arbitrary administration by the courts and the prosecution, and it is as a limit on that type of administration which the constitutional safeguards have traditionally been regarded.

CONCLUSION

For all of the reasons advanced herein the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES A. BELLOWS
Attorney for Petitioner

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
On the Brief

APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 16410
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CHARLES HOFFMAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 18, 1969

Before CASTLE, *Chief Judge,* KNOCH, *Senior Circuit Judge,* and KERNER, *Circuit Judge.*

KERNER, *Circuit Judge.* Charles Hoffman, Jr. (defendant-appellant) was indicted on five counts for violations of Title 18 U.S.C. §§1343 (Count 1), 1341 (Count 2), 1341 and 43 (Count 3), 371 (Count 4) and 2314 (Count 5) (federal mail and wire fraud, conspiracy, and interstate transportation of funds obtained by fraud). The jury returned a verdict of guilty on Counts 1, 2 and 4 and judgment was entered by the Court committing the defendant to a term of ten (10) years and a fine of Ten Thou-

sand ($10,000) Dollars on Count 4, and probation for a period of five (5) years after release from incarceration on Counts 1 and 2, conditioning the probation with the following: "[i]n addition defendant is required to make restitution in an amount agreed upon or ascertained by the Director of Insurance of the State of Illinois."

The transactions presented by the Government are intricate and complicated, involving defendant Charles Hoffman, and defendant Rufus R. McLarty. McLarty was discharged from prosecution before the conclusion of the trial, and Hoffman's motion for judgment of acquittal as to Count 3 (conspiracy) was granted.

This case involves the sale and manipulation of various insurance companies and agencies and their assets. The indictment alleges the criminal acts began "on or about December 1, 1963." Hoffman testified on direct examination that "in late 1960" he purchased all of the stock of RCD Insurance Agency (RCD Agency). In 1960 Multi-State Inter-Insurance Exchange (Multi-State) was an existing insurance reciprocal association (previously known as Rural Inter-Insurance Exchange), an aggregation of people who exchange contracts of insurance. A reciprocal is not a corporation, but is an association of individual underwriters, and each underwriter is liable for his share of any losses. The reciprocal is the property of the policyholders and, in this respect, is comparable to a mutual company.

RCD Management Inc. (RCD Management) was the attorney-in-fact for, and general manager of, Multi-State and its sales agency, RCD Agency. Multi-State sold only high-risk automobile policies through RCD Agency for which sales, RCD Agency was to receive a commission.

RCD Management, for its services as attorney-in-fact was to receive a 12% commission on premiums of all policies written by Multi-State and to be paid by Multi-State to RCD Management.

The Illinois Insurance Code requires all insurance writers to maintain a minimum surplus to cover unexpected contingencies. Failure to maintain this surplus requires notice to the Insurance Department and, should the assets be impaired, no new policies may be written. In the summer of 1963, the Illinois Department of Insurance commenced an examination of Multi-State, whose books reflected a failure to pay RCD Management the attorney-in-fact fees and the amount owed was not entered as a liability. The unpaid commissions totaled approximately $200,000, which liability impaired the reciprocal's surplus. Hoffman, the owner of all of the stock of RCD Management, stated he would waive all fees and commissions and an affidavit of waiver was filed on July 16, 1963; thereafter Multi-State was allowed to continue in business.

The Department of Insurance continued the examination of Multi-State. Listed as an asset were $50,000 in bonds issued by Griffin Finance, an unidentifiable entity. Hoffman and Vaughn Woodruff, his attorney, were informed by the Department that a cease and desist order would be issued against Multi-State because of impaired assets.

On November 29, 1963, the Department filed a complaint against Multi-State seeking to enjoin it from doing any business, and alleging violation of the Insurance Code. On December 6, 1963, the Circuit Court of Cook County ordered the books and property seized by the Insurance Department returned and entered an order allowing Multi-State to continue business if it would comply with certain conditions:

1. Cease and desist writing policies of insurance.
2. Cancel all outstanding insurance policies within a reasonable time.
3. Expeditiously dispose of all claims.
4. Prior to resuming the writing of new policies, notify the Director of Insurance of that intention and file a statement of condition which will be examined.

No other order was entered in the Circuit Court until an order of liquidation entered September 11, 1964.

Late in 1963, Hoffman began negotiations with McLarty for the sale of RCD Management and RCD Agency for the sum of $333,333, culminating in the transfer of ownership on February 4, 1964, and with it the resultant control of Multi-State. The sale was closed at a bank located in Reynolds, Georgia. Simultaneously, McLarty, on the representation of Hoffman that Multi-State was solvent, ordered a check drawn in the sum of $335,000 from the account of Multi-State payable to RCD Agency. RCD Agency, on McLarty's order, drew a check for $333,333 to Hoffman for the purchase price. The credit transactions were handled by wire and mails.

During the month of January, 1964, Hoffman withdrew monies of Multi-State from various banks in Chicago which were deposited to his personal accounts in the First National Bank of Evanston, or transferred them to a new Multi-State account newly opened in Kingland, Georgia. The dates and amounts are not controverted.

Evidence of additional inter-corporate activities and exchanges of assets and stocks were introduced into evidence covering a period prior to December 1, 1963, and extending into July, 1964. Some of these transactions relate to Multi-State, others to entities controlled by Hoffman.

On November 1, 1963, Hoffman presented to George Bloss, president and director of RCD Management, prepared minutes of a Board of Directors meeting of RCD Management. The minutes stated that the Directors had voted that RCD Management would sell its law library and two Chevrolet automobiles to So-Jess Management, Inc. (So-Jess) (an Illinois corporation owned by Hoffman which handled claims for Multi-State and Progressive General Agency), in exchange for office space and services to be rendered by So-Jess in the future. Bloss signed the minutes, though he testified no such directors meeting took place and no services were rendered to RCD Management by So-Jess. The value assigned to the library was $1,300 and $1,050 as the value of the automobiles subject to mortgages, though the mortgage payments were made by Multi-State in November and December, 1963, and January, 1964.

Early in 1963, Hoffman purchased the building at 180 W. Randolph, Chicago. The following were moved into the building: Multi-State, RCD Management, RCD Agency, So-Jess, Insurors Holding Corporation (an Illinois corporation, owned by Hoffman and his wife, which held stock in various entities involved), Progressive General Insurance Company (PGI) (an Illinois stock insurance company controlled and owned by Insurors Holding Corporation), and Progressive General Agency (PGA) (an Illinois corporation owned by Hoffman which was sales agent for PGI). Hoffman remodeled the building, improvements being paid for by PGA and RCD Management in the total sum of $39,763.32.

In September, 1963, RCD Management, on behalf of Multi-State, resolved to purchase these leasehold improvements for $83,000. Bloss, who signed the minutes at Hoff-

man's request, testified he did not vote on the resolution. The improvements were paid for by the transfer of Multi-State funds: $43,000 to PGA and $40,000 to RCD Agency.

A resolution of RCD Management on behalf of Multi-State, dated November 25, 1963, assigned the Multi-State leasehold at 180 W. Randolph to PGI immediately. Bloss, who signed the minutes, again testified he did so at Hoffman's direction, although no meeting took place. Prior to November 25 and until January 29, 1964, Multi-State made payments for improvements of the leasehold, which inured to the benefit of PGI in the sum of $116,154. This sum invested by Multi-State in the leaseholds was abandoned to PGI when Multi-State was removed from the premises as agreed in the contract of sale to McLarty, though McLarty had not been informed of the improvements paid for by Multi-State.

On December 30, 1963, RCD Agency loaned $20,500 to PGA. On the following day, an additional $69,250 was loaned to PGA. This sum of $89,750 belonged to Multi-State, and was offset under a contract between RCD Agency and PGA whereby four percent of RCD Agency's gross sales premiums would be paid to PGA for management and services. A computation of this contract of January 2, 1963, indicated a sum of $87,013.28 due, which was to be computed monthly, but had not been entered on the books of RCD Agency until December 31, 1963, and did not appear on the books of PGA until June 30, 1964. Bloss testified he knew of no services performed by PGA for RCD Agency during 1963.

The $87,013.28 owed by RCD Agency to PGA was offset by the $89,750 RCD Agency loaned to PGA, leaving a balance of about $2,500. After February 4, 1964, when

McLarty owned the stock of RCD Agency, he agreed to convey to PGA an installment note with a face value of $50,000, of which Hoffman was the obligor, "as an offset against the amount due to Progressive General Agency, Inc. from RCD Agency, Inc., relative to the four percent (4%) Service Representative Contract entered into on the second day of January, 1963," which contract was dated February 13, 1964, and was signed by McLarty, his wife and an officer of PGA. Bloss testified the contract had penciled initials on each signature line, and identified the penciled markings as those made by Hoffman.

Evidence of additional stock transactions was introduced showing the purchase of convertible debentures of Insurors Holding Corporation and stock of PGI by Multi-State in August, 1962. Multi-State paid $363,000 for these purchases; converting the debentures into 237.5 shares of Insurors Holding stock on February 4, 1964, in Atlanta, Georgia. Garland Byrd, attorney for McLarty, testified that Hoffman presented pre-prepared minutes of RCD Management providing for exchange of the 68,250 shares of PGI stock for 88.725 shares of Insurors Holding preferred stock. These pre-prepared minutes were then signed by McLarty, his wife and Byrd. Each signature line had been penciled with initials of the person to sign as in previously identified corporate minutes.

Multi-State sold its $363,000 investment in Insurors Holding Corporation on July 8, 1964, to So-Jess, for which it paid Multi-State the sum of $163,112.50 at $500 per share. The minutes of RCD Management authorized the sale by Multi-State dated May 28, 1964, and were signed by directors including Alfred Druker, who was also a director of the purchaser, So-Jess. During this same period, when So-Jess was purchasing identical stock at $500 per

share, PGA had paid prices ranging from $1,000 to $1,200 per share from individual owners.

Hoffman's appeal alleges the following prejudicial errors:

1. The court improperly admitted evidence of transactions prior to February 4, 1964.

2. The court did not take appropriate precautions to determine whether jurors had read news articles concerning the trial.

3. The court refused to give certain instructions requested by defendant.

4. The court permitted improper cross-examination of Vaughn Woodruff, defendant's attorney.

5. The prosecutor used inflammatory language in his closing argument.

6. The court erred in the sentencing.

Hoffman has not alleged any issue contesting the sufficiency of the evidence.

1. Prior Transactions

Hoffman alleges the trial court erred in permitting the Government to introduce evidence of transactions prior to and after the sale of the controlling stock to McLarty, contending that the evidence of the non-indictment events were inadmissible and of "no probative value" of his intent or motive to commit the offenses charged. Defendant cites *Boyd* v. *United States*, 142 U.S. 450 (1892), *United States* v. *Magee*, 261 F. 2d 609 (7th Cir. 1958), and *United States* v. *Dressler*, 112 F. 2d 972 (7th Cir. 1940), as sustaining his view that evidence that he was engaged in wrongdoing

unconnected with the charge in the indictment is error. We agree with the general statement. However, in each of the cases cited, the factual and evidentiary posture varies greatly from the case before us. In *Boyd,* the defendant was convicted of murder arising out of an attempt to rob. Over objection, the trial court allowed testimony before the jury concerning several other previously committed robberies in which the defendant participated. There was no causal connection or relationship between the robberies, and the court quite properly found error in their introduction at the trial. In *Magee,* a witness was allowed to testify, identifying the defendant as one who participated in a prior unconnected bank robbery in another state approximately two years previous to the robbery on trial. *Dressler* was a kidnapping trial, during which trial fingerprint cards were passed among the jurors. On the reverse side of the cards was the "criminal history" of the defendant which the court held was "prejudicial information" and therefore reversed the guilty finding.

Each of these cases is clearly distinguishable from the case before us. The general rule is that evidence that the accused has committed another crime independent of, and unconnected with the one on trial, is inadmissible. The cases cited by Hoffman clearly fall within this general rule. However, there are exceptions to this general rule, *Lisenba* v. *California,* 314 U.S. 219 (1941) held, at 227, "that similar but disconnected acts may be shown to establish intent, design, and system." *Bracey* v. *United States,* 142 F. 2d 85, 87 (D.C. Cir. 1944), sets forth the exception with greater detail:

> However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and

> circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends locally to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive.

This rule has been recognized in this circuit for many years and more recently was stated in *United States* v. *Wall,* 225 F. 2d 905 (7th Cir. 1955); *United States* v. *Iaeullo,* 226 F. 2d 788 (7th Cir. 1955), *cert. denied,* 350 U.S. 966 (1956); *United States* v. *Magee,* 261 F. 2d 609 (7th Cir. 1958) (one of the cases relied upon by defendant); *United States* v. *Phillips,* 375 F. 2d 75 (7th Cir. 1967); and *United States* v. *Cobb,* 397 F. 2d 416 (7th Cir. 1968).

The intent and motive of Hoffman was expressed by him around Thanksgiving of 1961. Fred Levin, an attorney for the Illinois Department of Insurance, testified that during a meeting concerning the financial impairment of Multi-State, Hoffman "told me that if the State continued to push him on these things, he would write an excessive amount of premium and leave the State with an empty shell of a company."

In November, 1963, the Illinois Director of Insurance attempted to enjoin Multi-State from transacting any further business. Simultaneously, Hoffman set in motion

the series of transactions that finally depleted the assets of Multi-State, as well as the intricate direction of multitudinous inter-organizational assumptions of financial obligations and asset transfers all of which were "so blended or connected with the one on trial as that proof of one incidentally involves the other." *Bracey* v. *United States, supra.* Hoffman continued to execute his threat to leave an "empty shell" through his actions and directions after the "sale" in February, 1964, by obtaining the signatures of the "purchasers" on documents authorizing transfers after the sale date.

We hold that the trial court properly allowed the introduction of other transactions to prove motive and design to establish a common scheme relating to the matter on trial.

2. Publicity

Hoffman further alleges as error that the court did not take appropriate precautions to determine whether jurors had read newspaper stories about him which were published during the trial and thereby were prejudiced. Hoffman did move that each juror be asked out of the presence of the others whether he had read the story carried in a Chicago daily newspaper of May 5, 1967. The motion was denied by the court which followed this ruling with a restatement of his daily admonition of caution about hearing or seeing anything in any media printed or otherwise, and asked the jury collectively whether anyone had heard or read anything relating to the case on trial. No response was made by any juror. On May 9, a similar motion was made following another news story; the motion was denied; the same question was asked and no juror responded.

The court carefully instructed the jury not to read any articles relating to the trial on numerous occasions during the trial, as well as the two specific dates when news articles were printed. The claim of prejudice is based upon a speculation that the jurors violated the court's admonitions and it was error for the court to deny individual examination of the jurors about the news stories.

This Court recently held in *Margoles* v. *United States*, 407 F. 2d 727, 735 (7th Cir. 1969), that "the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further."

Thus, the district court in the instant case committed no error in its collective inquiry of the jury.

3. Instructions

The defendant further assigns as error the failure of the court to give certain instructions requested by him. We have reviewed the instructions given by the court and find that Judge Austin met all the criteria of informing the jury of the essential elements of the indicted offenses for which Hoffman was being tried. Certain of the instructions refused were intended for the purpose of informing the jury that some of the Government's evidence introduced had no direct application to the crimes for which Hoffman was being tried. The court adequately

covered these transactions in the given instructions, informing the jury that this evidence was introduced for the

> "[L]imited purpose of determining whether or not the defendant had a motive to commit the crime charged, and were not introduced into evidence to prove a particular transaction with which he is charged. You are to consider that evidence only for the purpose of determining whether or not defendant had a motive for committing those acts charged in the indictment."

The court adequately informed the jury of the difference and protected defendant's presumption of innocence. Additionally, the instructions given precisely set forth the necessary elements of the crime alleged to have been committed.

Defendant further contends that refused instruction 17 prejudiced his position in that the given instruction inadequately informed the jury of the Government's responsibility to prove the crime charged in Counts 1 and 2. Count 1 alleged that defendants did falsely pretend there was a sum of money due and owing RCD Management from Multi-State. Count 2 further alleged that, as part of the scheme, defendant Hoffman caused $585,845.21 to be transmitted by mail and telegram to the Citizens State Bank at Reynolds, Georgia, for credit to the account of Multi-State, that defendant Hoffman sold and defendant McLarty purchased all the stock of RCD Management and RCD Agency, that defendant McLarty transferred $335,000 of Multi-State's account to RCD Agency's account, that McLarty thereafter transferred $334,000 from RCD Agency's account to himself, and finally that McLarty transferred $333,000 from his own account to defendant Hoffman. The court's instructions informed the jury of the elements necessary and the Government's burden of proof that the alleged false pretense that Multi-

State owed a debt to RCD Management and RCD Agency must be proved beyond a reasonable doubt. We find the court committed no error in its instructions.

4. Cross-Examination

The defendant contends the court committed error in permitting certain cross-examination of Vaughn Woodruff, Hoffman's attorney during 1963 and 1964. The error alleged is that the cross-examination extended beyond the scope of the direct examination. Defendant called Woodruff as his witness and, during his qualifying of him as an expert witness, reviewed his education and various positions of employment since his admission to the bar. The court during this qualifying questioning suggested that Woodruff's admission to the bar of Illinois was adequate. Counsel persisted in qualifying and proceeded to do so after which Woodruff testified that he represented many insurance companies. The Government, on cross-examination, asked Woodruff whether or not 13 of the insurance companies he represented had become insolvent. Defendant claims this form of questioning nullified him as a witness and prejudiced Hoffman in the eyes of the jury. Defendant by persisting in his expert qualification of Woodruff, opened the door to cross-examination in a manner common in trial practice and cannot now complain for having provided the vehicle. It is a well settled rule of law that cross-examination is limited to matters embraced within the direct examination. An exception is that cross-examination is permitted for testing witnesses' memory. *Lewis v. United States,* 373 F. 2d 576, 578 (9th Cir. 1967). The court properly overruled defendant's objections, and might have committed error had he ruled otherwise. *United States* v. *Mills,* 366 F. 2d 512 (6th Cir. 1966).

5. Closing Argument

Defendant contends further that remarks of government counsel in his closing argument were improper and inflamed the jury and that the court erred in not granting his motion for a mistrial.

In an examination of the Government's closing argument, we believe counsel did appeal to sympathy and passion. His reference to defendant as a liar, crook, wheeler and dealer, and similar terms were not conducive to the fair trial to which defendant was entitled. The reference to "contempt for law and order," at a time when there is a general public concern for personal safety, is an unfortunate reference. It is understandable that lawyers in their advocacy may on occasion become emotionally involved in a matter on trial; thus in the interest of the law we each have sworn to uphold, we must constrain our emotional characteristics to provide fairness and justice. Nevertheless, a review of the entire record convinces us that the excesses of argument are harmless error in the light of the weight of the evidence. *Chapman* v. *California,* 386 U.S. 18, 22-26 (1964); *Harrington* v. *California,* 395 U.S. ....., ..., 37 U.S.L.Week 4472, 4473 (No. 750, June 2, 1969); and *United States* v. *Fidanzi,* ..... F. 2d ..... (7th Cir. No. 16984, June 23, 1969) (*Slip Opinion* at 3).

The record is replete with evidence of the manipulations of Hoffman, more than sufficient to sustain the finding of guilty by the jury. Counsel's argument, while improper in its intensity, was an accurate characterization of defendant's actions. *United States* v. *Fidanzi, id.* at ..... (*Slip Opinion* at 2).

6. Sentencing

The final allegation of error relates to the sentencing of Hoffman. The court entered judgment on the verdict committing defendant to the custody of the Attorney General or his authorized representative for a period of ten (10) years and a fine of Ten Thousand ($10,000) Dollars and costs on Count 4, and placed him on probation for a period of five (5) years on Counts 1 and 2, subject to making "restitution in an amount agreed upon or ascertained by the Director of Insurance of the State of Illinois."

Defendant contends that the incarceration sentence followed by a period of probation is in violation of his civil rights. There is no substance to this claim of error since the violations for which defendant was found guilty are two separate offenses under 18 U.S.C. §2314 and §§1343 and 1341. *Blockburger* v. *United States,* 284 U.S. 299 (1932).

We find that the conditioning of probation upon restitution of a sum of money to be determined is violative of 18 U.S.C. §3651, which provides that a defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense which conviction was had."

The cases in reference to the interpretation of this section are few in number. *United States* v. *Follette,* 32 F. Supp. 953 (E.D. Pa. 1940), involved embezzlement and conversion of $203.99 of U.S. postal funds. Judge Maris, at the expiration of the probationary period, had presented to him the question of restitution of the sum of $466.28, a sum greater than that for which defendant had been convicted, arising from other embezzled funds.

The court held that it had no authority to order, as a condition to probation, the repayment of a sum greater than the actual losses caused by the offense. *Karrell* v. *United States,* 181 F. 2d 981 (9th Cir. 1950), is a Service Readjustment Act of 1944 case concerned with an overpayment for the purchase of real estate in a sum greater than the appraised value. In sentencing the defendant, probation was conditioned upon restitution to 18 designated veterans of listed overpayments aggregating $7,300. The indictment contained seventeen counts; defendant was acquitted on two counts, guilty on six counts, and nine counts were dismissed. The order of restitution included all seventeen named veterans and an additional veteran not named in the indictment. The court followed the interpretation in *Follette* and remanded the cause to the trial court ordering limitation of the sum as restitution to the difference between the appraised value and the actual purchase price suffered by the six veterans named in the six counts upon which defendant was convicted. For such a condition of probation, the parties aggrieved must be certain and the amount of restitution definite of computation.

United States v. *Stoehr,* 196 F. 2d 276 (3d Cir. 1952), is a case in which defendant was convicted of evading federal income taxes for the years 1943, 1944 and 1945. Defendant was fined $10,000 and sentenced to imprisonment for a period of three years on each of the first two counts, to run consecutively, and probation on Count 3 conditioned upon payment of all income taxes due the United States with interest and penalties. The court held that since the exact amount is not determined by the criminal action, the condition of probation must be modified to read "finally determined to be due for the years involved," or the condition of probation is inoperative.

United States v. *Taylor*, 305 F. 2d 183 (4th Cir. 1962), the most recent of the cases interpreting 18 U.S.C. §3651, also involved a federal income tax matter. Defendant pled guilty to two of the counts and was found guilty by a jury on the third count. He was sentenced to a prison term of one year and fined $5,000 on each of the first two counts, the prison terms to run consecutively, and on the third count, a prison term of two years to run consecutively with the first two counts, plus a fine of $10,000. The prison sentences were suspended and defendant placed on probation for a period of five years, conditioned upon payment of a total fine of $20,000 by March 1, 1962, and to pay to the District Director of the Internal Revenue Service the sum of $32,210.40, with interest thereon. Defendant appealed, challenging the court's right to impose certain of the special conditions of probation. The court found that (*id.* at 186):

> [the] District Judge's order is quite confusing and certainly does not set forth an account of defendant's total tax liability with precision and clarity. We are thus unable to ascertain from the record before us the amount of tax actually owed by defendant . . . ."

The court further found that the amounts to which the district judge was limited were the basic amount, stated in the indictment for the year 1955, and the amounts admitted for the years 1958, 1959 and 1960. Any amounts in excess of this sum "may not, as a condition of probation, be directed to be paid during the probationary period prior to the time such amounts are finally and legally determined, and then only if collection is not barred by the statute of limitations." *Id.* at 187.

It is our finding on the record before us that the "aggrieved parties" portion of §3651 is not identified here

and the "actual damages or loss caused" is not fixed nor is the sum definite or yet determined with exactitude. Failure of the condition of probation to meet the requirements of identity and amount requires that the cause be remanded for revision of the condition of probation to meet the requirements of 18 U.S.C. §3651, or the vacation of such condition.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, July 18, 1969

Before

Hon. LATHAM CASTLE, *Chief Judge*
Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

United States of America,

Plaintiff-Appellee,

No. 16410 vs.

Charles Hoffman, Jr.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part, and that this cause be, and it is hereby REMANDED to the said District Court, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, August 13, 1969

Before
Hon. LATHAM CASTLE, *Chief Judge*
Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

United States of America,

Plaintiff-Appellee,

No. 16410 vs.

Charles Hoffman, Jr.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

IT IS ORDERED by this Court that the petition for rehearing in the above-entitled cause be and the same is hereby denied.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cases:	
Blockburger v. *United States*, 284 U.S. 299	14
Gore v. *United States*, 357 U.S. 386	14
Hackworth v. *United States*, 380 F. 2d 19	12
Harrison v. *United States*, 387 F. 2d 614	12
Jones v. *United States*, 258 U.S. 40	10
Lisenba v. *United States*, 314 U.S. 219	10
Love v. *United States*, 386 F. 2d 260 certiorari denied, 390 U.S. 985	10
Mares v. *United States*, 383 F. 2d 805	14
Marshall v. *United States*, 360 U.S. 310	14
Nye and Nissen v. *United States*, 336 U.S. 613	10
Schaffer v. *United States*, 362 U.S. 511	13
United States v. *Vastine*, 363 F. 2d 853	12
Wood v. *United States*, 16 Pet. 360	10
Statutes and Rules:	
18 U.S.C. 1341	2
18 U.S.C. 1343	2
18 U.S.C. 2314	2
Proposed Rules of Evidence for the federal courts, Rule 4-03(a)	11-12

366-019—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 581

CHARLES HOFFMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1969. A petition for rehearing was denied on August 13, 1969. The petition for a writ of certiorari was filed on September 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's contemporaneous acts and transactions, in which petitioner improperly utilized the assets of the insurance association which he controlled for his own benefit, was

properly admitted into evidence to show his intent in the similar fraudulent conduct here charged, involving the same insurance association.

2. Whether, following a directed acquittal of petitioner's co-defendant, the court adequately instructed that the evidence admitted solely as to the co-defendant was not to be considered against petitioner.

3. Whether the trial court took sufficient cautionary measures to insure that the jury not read news items about the trial.

4. Whether the court properly imposed consecutive sentences for different acts and offenses committed on different dates.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of fraud by wire, in violation of 18 U.S.C. 1343 (count 1); mail fraud, in violation of 18 U.S.C. 1341 (count 2); and interstate transportation of funds obtained by fraud, in violation of 18 U.S.C. 2314 (count 4).[1] The court sentenced petitioner to imprisonment for ten years on count 4, and on counts 1 and 2—the wire and mail fraud counts—to probation for five years, to commence upon release from incarceration under count 4. A condition of probation

[1] At the close of all the evidence, the court directed acquittal of co-defendant Rufus McLarty on all charges and of petitioner on the charge of conspiracy (count 3) (App. 928).

"App." refers to appellant's appendix, "R." to the record, and "G.E." to government exhibits, in the courts below; "Pet. App." to the appendix to the petition for certiorari. All these documents are on file with the Clerk of this Court.

was to be that petitioner make restitution to the aggrieved parties (App. 2–9, 28–29). The court of appeals held that the condition of probation was indefinite in the form expressed and remanded for revision or vacation of the condition; otherwise the court affirmed the judgment (Pet. App. A. 19).

This case deals with a variety of complicated transactions involving the sale and manipulation by petitioner of certain insurance companies and their assets. The relevant evidence is set out in some detail in the opinion of the court below (See Pet. App. A. 1–7). In outline, it showed as follows:

Multi-State Inter-Insurance Exchange (Multi-State) was an insurance reciprocal operating in Illinois.[2] It sold only high risk automobile insurance to persons who had bad driving records (App. 534). Its sales agency was R.C.D. Insurance Agency (Agency). A different corporation, R.C.D. Management, Inc. (Management), was the attorney-in-fact for Multi-State and managed its affairs. Petitioner owned all the stock in Agency and Management.

Examination of the books of Multi-State by the Illinois Department of Insurance, commencing in the beginning of 1963, revealed that Multi-State did not have a surplus over its liabilities;[3] that its books

[2] Under Illinois law, an insurance reciprocal is an association of persons who aggregate their money to pay losses sustained by their members (App. 85). It is the property of the policy holders who are each responsible for a proportionate share of any of its losses (See Pet. App. A. 2).

[3] Under Illinois law, if the surplus falls below minimum requirements, notice must be given to the Insurance Department, which in such circumstances might order the company to refrain from writing new insurance (App. 91–92, 96).

failed to show a debt of approximately $200,000, based on 12% premium fees owed to Management, and that this debt if paid would have rendered Multi-State insolvent (App. 98, 127–133, 1025–1040; G.E. 1, 2, 4). Petitioner, the owner of Management, advised the Insurance Department that he did not intend to collect this debt and, in 1963 executed a waiver in writing of all commissions owed to Management from October 31, 1960, to December 31, 1962 (App. 134, 1040; G.E. 5).

As the examination continued, further difficulties in Multi-State's financial situation were revealed (See App. 136–143). After a variety of judicial proceedings to determine whether Multi-State could legally write new business (See App. 136–143, 144–146, 148–149, 151, 1041–1042, 1043–1045; G.E. 6, 7, 8), on December 18, 1963 a consent order was entered by a state court, pursuant to which Multi-State agreed to cease writing new policies, to dispose expeditiously of all claims against it, and not to resume the writing of policies without first notifying the Department and submitting to an examination (App. 152–153, 1045–1046; G.E. 9).

At the end of 1963, the books of Multi-State showed that it was insolvent to the extent of $783,000 (App. 378–379, 634–636, 1047–1049; G.E. 13). At that time, Agency owed it $607,000 and had no license to sell insurance (App. 387, 548, 635). Management had no value since its function was to act as attorney-in-fact for Multi-State, which was then insolvent.

2. In this state of affairs, petitioner on February 4, 1964, sold Management and Agency to co-defendant McLarty. The contract of sale, drawn by petitioner (App. 836), recited and made a part of the agreement that the principal assets of Agency consisted of its "many years of past and future good will" and its agency agreement with Multi-State; that the principal asssets of Management were its attorney-in-fact agreement with Multi-State and "its great earning power for the many years ahead"; and that the buyer had examined all the records of the three entities involved and was fully apprised of their financial condition (App. 1065–1069; G.E. 45).

By a complicated series of financial transactions, the amount paid by McLarty to petitioner came from a total of more than $585,000, which petitioner had withdrawn from bank accounts of Multi-State and ultimately had forwarded to a bank in a small town in Georgia (App. 204–206, 394, 620, 308, 216–217, 1063–1064, 325–339; G.E. 43–A, 44–A, 44B).[4] The final

[4] The process by which this was accomplished is significant. On January 2, 1964, petitioner directed the president of Management to draw a check payable from Multi-State funds to petitioner. On behalf of Management, the president inquired where it was going, that it was "an awful lot of money." Petitioner replied, "That's none of your business. Just sign it and I'll take care of it" (App. 195, 549, 1056; G.E. 31). The check was deposited in petitioner's personal account (App. 199). On the same day, a check for $30,000 transferred funds from Multi-State to Agency and petitioner drew a check on Agency to himself, for salary, in the amount of $20,000, which he deposited along with the $252,000 check, in his personal account (App. 192–196, 199, 406, 620, 1956; G.E. 31, 32). These sums were converted into cashier's checks of the same two amounts, pay-

agreement, executed on February 4, 1964, was accompanied by petitioner's affidavit that he was the president of Management. The purchase and sale agreement stated that he had not waived any rights to a contract he had with Management, by which petitioner was to receive the 12% commissions which he had previously waived (*supra,* p. 4). Petitioner told McLarty that under this agreement there had accrued an amount of $400,000 owed to him; and that he was agreeing to make the transfer for a lesser amount (over $300,000) for tax purposes (App. 233, 236, 239). Petitioner assigned the contract to McLarty with the approval of Management (App. 223–225, 1070–1073; G.E. 46).[5] The net result of the financial manipulations of Multi-State's $585,000, was that petitioner received from McLarty $333,000 from funds transferred from Multi-State to McLarty (App. 300, 304–306, 360–361, 1074; G.E. 49). It was admitted,

---

able to petitioner (App. 200–201, 1061; G.E. 41–A). On January 28, 1964, petitioner closed out two accounts of Multi-State, causing to be drawn two cashier's checks for $123,000 and $99,000, respectively (App. 1061, 1075; G.E. 52–C, 52–D, 42–C). He also cashed a certificate of deposit of Multi-State, in the amount of $50,000, thereby forfeiting accrued interest of $2,000, stating in the endorsement, "All interest is waived, company needs funds for emergency for business needs" (App. 314–315, 348–349, 1061–1062; G.E. 42–A, 42–F). On January 29, petitioner withdrew $50,000 from another account of Multi-State, which was converted into a cashier's check (App. 1059; G.E. 37–E).

[5] Actually, this contract between Management and petitioner had already been terminated two days before (App. 1050; G.E. 14–A), and Multi-State was indebted neither to Agency nor to Management (App. 387).

both by petitioner and by McLarty's attorney at trial, and shown also by examination of the accounts, that McLarty paid nothing to acquire these two corporations and the resulting control of Multi-State (App. 449, 636, 840).

The charges upon which petitioner was convicted centered on various facets of this transaction with McLarty. Count 1 alleged that petitioner and McLarty devised and carried out a scheme to defraud the policy holders of Multi-State, and claimants against them, by fraudulently obtaining the money and property of Multi-State; that a part of this scheme was to pretend that $400,000 was due from Multi-State to Management; that petitioner caused approximately $585,000 to be transferred to a North Carolina bank, of which $333,000 was diverted to McLarty for the purpose of buying the stock of Management and Agency from petitioner and that on February 3, 1964, wire communication was used to transmit the credit of $585,000 to the North Carolina bank (App. 2–5). Count 2, incorporating the foregoing allegations except as to the wire communication alleged that on February 3, 1964, petitioner and McLarty caused a credit memorandum showing transfer of $585,000 to be sent by mail from Illinois to North Carolina (App. 5). Count 4 alleged that on February 5, 1964, petitioner caused $333,000 to be transported from North Carolina to Illinois, knowing that it was obtained by fraud (App. 9).

3. The government introduced additional evidence, independent of the transaction with McLarty, on the

issue of intent.[6] This evidence showed other fraudulent transfers of Multi-State assets, largely to other insurance companies owned by petitioner. These intricate transactions are detailed in the opinion of the court of appeals (Pet. App. A 4–7) and need not be repeated here.[7] In essence, they showed the stripping of Multi-State's assets through complex arrangements with other companies owned or controlled by petitioner.[8]

A lawyer formerly with the Department of Insurance testified to a conversation with petitioner in November 1961, in which he told petitioner that he should see that a more equitable position was maintained by Multi-State toward the claims submitted to it by policy holders. Petitioner replied "that if the State continued to push him on these things, he would write an excessive amount of premium and leave the

[6] Petitioner is mistaken in asserting that his request for discovery of documents relating to events occurring after February 4, 1964, the date of the sale to McLarty, was denied (Pet. 6). Judge Austin, on December 21, 1966, made a comprehensive order that all documents of Multi-State, Management, and Agency be made available to petitioner, on the most liberal terms and without restriction as to date (R. 104–109). Petitioner does not contend that the government failed to comply with this order.

[7] Petitioner was not surprised by this evidence, which had been the subject of extensive litigation in which he was represented by his principal counsel in the present trial. See App. 814, 841; R. 341, 347, 373, 414–415, 365). Counsel anticipated that these matters would be brought up in this trial (App. 34–42).

[8] For illustrations of these arrangements see, *e.g.*, (1) App. 543–545, 660–662; (2) App. 645–647, 649–652, 565–566, 654–659, 553, 531, 533, 536, 541, 543, 551, 552; (3) App. 477–479, 236, 480–481, 488–489.

State with an empty shell of a company" (App. 692, 696).

Petitioner in his testimony took the position that he acted in good faith and upon the advice of his attorney in representing that $400,000 was owed to Management and had not been waived. He testified (App. 775) that one of Illinois' insurance examiners "stated to me that * * * in order for me to obtain a complete favorable examination report on Multi-State, I would have to furnish him with this affidavit waiving the attorney-in-fact fees for 1961 and 1962. * * * I said in order to obtain a complete favorable examination report, I would comply with his request." His attorney had advised him, when he related these facts, that this was a conditional waiver to which he should give no consideration in calculating his fees. He testified that he believed his attorney and acted on his advice (App. 783–784, 797). The attorney corroborated this conversation (App. 866–867). Petitioner made no explanation why he considered it proper to transfer the funds of Multi-State in such a manner as to make them available for the purchase by McLarty of Management and Agency at no cost to the latter.

ARGUMENT

1. Petitioner's principal contention is that the trial court admitted a large volume of evidence which was unrelated to the specific offense charged. The court below properly rejected this claim. The offense here charged was that petitioner and McLarty devised and executed a scheme "to defraud the policy holders and

claimants against the policy holders of Multi-State and for obtaining the money and property of Multi-State by means of false and fraudulent pretenses" (App. 3). As "a part of the scheme" the details of the February 4, 1964, sale to McLarty and the representation that $400,000 was due Management from Multi-State were set forth. Petitioner sought at trial to exculpate himself as to the false representation concerning the $400,000 by the plea that he acted on the advice of counsel. It has long been settled law that:

> where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. * * * [*Wood* v. *United States,* 16 Pet. 342, 360.]

The trial court, in short, has broad discretion in allowing testimony which discloses the purpose, knowledge or design of a particular person where intent is in issue. *Jones* v. *United States,* 258 U.S. 40, 48; *Lisenba* v. *United States,* 314 U.S. 219, 227; *Love* v. *United States,* 386 F. 2d 260, 266–267 (C.A. 8), certiorari denied, 390 U.S. 985; *Nye and Nissen* v. *United States,* 336 U.S. 613, 618.

In view of the fact that petitioner based his defense at trial on the argument that he did not have a fraudulent intent when he represented that Multi-State owed $400,000 to Management, the court quite correctly allowed the government to present evidence of other fraudulent transactions between petitioner and Multi-State in order to prove that petitioner had a fraudulent intent. As the court below recognized, the entire history of petitioner's transactions with Multi-State evidences a very conscious intention to drain Multi-State of its assets in a fraudulent manner, a fact which is crucially relevant to the government's answer to the defense raised by petitioner. Furthermore, the court adequately protected petitioner with its instruction that the jury should consider evidence of transactions not charged in the indictment only for purposes of determining intent and motive.[9]

Citing Rule 4–03(a) of the Proposed Rules of Evi-

[9] The instruction was in the following language (App. 1003):

"Now, you have heard evidence relating to certain transactions that are not charged in the indictment. That evidence has been offered for the limited purpose of determining whether or not the defendant had a motive to commit the crime charged, and were not introduced into evidence to prove a particular transaction with which he is charged. You are to consider that evidence only for the purpose of determining whether or not the defendant had a motive for committing those acts which are charged in the indictment.

"Evidence of those transactions which are not charged in the indictment shall not be considered by you until you find that the acts charged in the indictment have been done, and you are proceeding to determine the motive and the intent of the defendant."

dence for the federal courts (Pet. 23)[10] petitioner urges that the evidence of other transfers of assets of Multi-State outweighed in prejudice its relevancy to the issues. The comment to the proposed Rule defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Thus, for example, problems arise as to introducing evidence of a former conviction, remote in time, or of a different nature from the act charged, or where the prospect of introducing a former conviction may deter an accused from exercising his right to testify in his own behalf. Here no such problems were presented. The other transactions were substantially contemporaneous. They involved the same parties and the same question of intent. Their total effect was to refute petitioner's claim to good faith, because they showed an executed plan for the systematic plundering of Multi-State.[11]

2. Petitioner raises as an issue (Pet. 3, see also Pet. 15–16) but does not argue that the evidence introduced against McLarty was prejudicial to petitioner's

---

[10] This reads:

"*Exclusion Mandatory.* Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

[11] The further contention that the admission of this evidence should have been accompanied by an instruction as to its purpose is without substance. Petitioner made no request for such a limiting instruction. Cf. *Harrison* v. *United States*, 387 F. 2d 614, 615 (C.A. 5); *Hackworth* v. *United States*, 380 F. 2d 19, 20 (C.A. 5); *United States* v. *Vastine*, 363 F. 2d 853, 855 (C.A. 3). In any event, such an instruction was in essence given by the trial court. See n. 9 *supra*, p. 11.

case. The court indicated early in the trial that a motion for judgment of acquittal by co-defendant McLarty might be well taken (App. 289–290). Thereafter the court exercised great care to advise the jury that all evidence which related solely to the conduct of McLarty was not to be considered in regard to petitioner (App. 309, 317, 319, 461, 467). Following the directed acquittal of McLarty, request was made on petitioner's behalf that the court strike from the record all references by government counsel in his opening statement, all testimony, all exhibits, and all parts of exhibits admitted which pertained solely to McLarty. The court asked counsel how this should be done. The reply was that the court should specify for the jury the names of witnesses whose testimony had been stricken. The court asked if it should go through the transcript and advise the jury, reading the testimony, that this was not to be considered against petitioner. Counsel stated that he did not know how it was feasible to do it at this stage. The court said that the way to do it was simply to tell the jury to disregard any evidence that was admitted solely as to the defendant McLarty (App. 931–932). In giving the promised instruction,[12] the court followed the only practicable course. There is no reason to believe that the jury failed to understand and follow the instruction. Cf. *Schaffer* v. *United States,* 362 U.S. 511.

[12] This was as follows (App. 1009): "During the course of this trial, certain evidence was admitted solely against the defendant Rufus McLarty, and I instruct you now as I have done throughout the trial not to consider that evidence against the defendant Hoffman. You are also to disregard all references

3. There has been, as petitioner urges, a tendency in some circuits to favor separate examination of jurors when there is a claim as to their possible contact with publicity unfavorable to the accused. Here the publicity in question seems less significant than the evidence which the jurors daily heard. (See Pet. 18–19). There is not here, as in *Mares* v. *United States,* 383 F. 2d 805 (C.A. 10), upon which petitioner particularly relies, any such "extreme situation" as a withdrawn guilty plea or an excluded confession. The headlines were innocuous. As the court below pointed out (Pet. App. A11–12), the trial court was meticulous in its daily admonitions and the possibility of prejudice would appear to be remote. As was said in *Marshall* v. *United States,* 360 U.S. 310, 312, each case must turn on its special facts. The situation here gives no substantial basis for concluding that the jury failed to follow the trial court's repeated warning that the jury avoid any outside reference to the case.

4. The court properly imposed consecutive sentences. The offense of transporting interstate money obtained by fraud involved wholly separate acts, even on a different day, from the offenses of wire fraud and mail fraud, as to which probation for a period of five years was imposed. The question involving consecutive punishment arising from a single transaction in *Blockburger* v. *United States,* 284 U.S. 299, and *Gore* v. *United States,* 357 U.S. 386, is thus not presented on this record (See opinion of court of appeals, Pet. App. A16).

---

made by Mr. Schultz in his opening statement as to what he expected to prove against the defendant McLarty."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
KIRBY W. PATTERSON,
Attorneys.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHARLES HOFFMAN, JR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONER

CHARLES A. BELLOWS
Ten South LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
on the brief

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 581

CHARLES HOFFMAN, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

On the points raised in our Petition, we make the following Reply, which we believe is all that is necessary, to the Government's Brief in Opposition. We use the same headings and numerals (where applicable) as in the Petition:

STATEMENT

The Government's Brief recites (G.Br., p. 4) that "At the end of 1963, the books of Multi-State showed that it was insolvent to the extent of $783,000 * * *" This recitation is misleading. No claim was made, during the state court proceedings in November-December, 1963, that Multi-State was insolvent. (A. 878) In fact, the last financial statement filed by Multi-State during Petitioner's employment (June 30, 1963 Statement; filed in August, 1963; G.Ex. 2, A. 1032-3) showed assets of $2,461,725 and a surplus of $250,000. Multi-State's 1963 year-end statement showed a deficit surplus of $783,000. but the draft of that statement was not prepared until March, 1964, by an accountant retained by McLarty after he had acquired control of Multi-State. (A. 412; G.Ex. 13, A. 1047-9)

The Government is mistaken in its claim (G.Br., p. 8 note 6) that the trial judge had ordered the Government to make the documents relating to events occurring after February 4, 1964, available to the defense. On February 20, 1967, Judge Austin ordered that the Government make available records taken from the defendant; he denied the motion for discovery as to all other records. (R. 160; A. 10) Subsequently, on March 21, 1967, after the December 21, 1966, order referred to in the Government's Brief and the February 20, 1967, order referred to above, Petitioner moved for additional discovery in the form and for the reasons described in the Petition (p. 6). At this hearing, Judge Austin specifically noted that his original "turnover" order was limited. (A. 1016) Counsel for the defendant explained that this motion, requesting an order directed to the Illinois Department of Insurance and the Bureau of Liquidations, sought discovery of books and records of the company which had been reconstructed by

the Director of Insurance as the Liquidator. (A. 1016) Judge Austin, however, viewed these books and records, because they were the products of the reconstruction efforts by the Department of Insurance, as internal memoranda of the Department (A. 1016-17), and, as a result, ruled that the defense could have access only to "all the books that you had in your possession and all the data that was in your possession prior to the time of the liquidation * * * *" (A. 1018) The Petitioner's efforts to obtain discovery of the other documents was, as reported in the Petition, denied.[1]

---

[1] The Government claims that Petitioner's trial counsel was not surprised by the admission of the extra-indictment transactions. (G.Br., p. 8 note 7) That counsel's response to the same charge, when it was made in the Court of Appeals, should be noted:

> "Contrary to the assertions in the footnote on pages 40 and 41 of the government's brief [filed in the Court of Appeals], Hoffman's counsel were totally unfamiliar with almost all of the non-indictment transactions when this trial began. In the Multi-State civil case (65 CH 4823), Hoffman's counsel had handled a petition for writ of mandamus in the Supreme Court of Illinois, dealing with one narrow legal issue. (Docket No. 39518.) They had also acted as counsel for Progressive General in a rehabilitation case brought by the Director of Insurance, which was pending at the time of the trial in the court below. (65 CH 5817; see also 84 Ill. App. 2d 109 (1st Dist. 1967) and 85 Ill. App. 2d 427 (1st Dist. 1967).)" Appellant's Reply Brief filed in the Court of Appeals, pp. 8-9 footnote.

REASONS FOR GRANTING THE WRIT

1. The admission of a large volume of evidence unrelated to the specific offense charged in the indictment.

That the evidence admitted solely against the subsequently acquitted co-defendant, McLarty, was prejudicial to Petitioner's case is a theme which runs throughout Petitioner's arguments. (See, e.g., Petition, Point 1, pp. 24-25; Point 2, p. 25) Thus, we are unable to understand that portion of the Government's Brief which asserts that Petitioner does not argue that the evidence of McLarty's conduct subsequent to February 4, 1964, was prejudicial to his case. The evidence was originally admitted over the objections of both defendants that it was incompetent to prove their motives and intents on February 4, 1964. (A. 278-94) When McLarty was acquitted, Petitioner claimed that the evidence was wholly incompetent for any purpose, and requested that the jury be advised of that fact by a specific reference to the names of the witnesses who gave the evidence and to the specific exhibits. He provided the district judge with a means of identifying this evidence to the jury. (A. 17-22)

The Government, however, relies on the fact that Petitioner's counsel was reluctant to have the trial judge read the testimony *itself* before telling the jury to disregard it. (A. 932) It is inconceivable that Petitioner could be considered to have abandoned his specific request to have the stricken evidence identified by means of the witness who gave it merely because he did not wish the trial judge to

read the testimony in its entirety to the jury before telling them to forget all about it. If it is impossible to "unring" a bell, it is twice as impossible to "unring" a twice-rung bell.

Respectfully submitted,

CHARLES A. BELLOWS
Attorney for Petitioner

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
on the brief